Deployment Fiscal Law

Mr. Darrell Phillips

International and Operations Law Division

Air Force Judge Advocate General School

Maxwell AFB, Alabama

The Traditional Approach

"The Law of War recognizes that the business of the military in war is killing people and breaking things."

Legal Counsel to the Chairman
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The New Approach

“It seems to me that killing people and breaking things has given way to feeding people and fixing things.”

Legal Counse
J

The Newest Approach

It seems that we are now feeding people and fixing things at the same time that we are killing people and breaking things.

Overview

- **Deployment-related Acti**
  - **(Big 3 Issue Areas)**
- **OHDACA**
- **Acquisition & Cross-Servicing**
- **CINC Initiative Funds**
- **Preparing to address Fiscal Law Questior**

International Agreements

- Agreement with foreign government(s) or international organization(s) that:
  - Is signed by U.S. representative
    - Dept of State unless delegated
  - Signifies intent to be bound
- Oral agreements can be binding when reduced to writing

I.A. Problem Areas

- **Survey teams or other personnel trying to prepare for (or during) deployment may make "unauthorized" promises that are binding international agreements**
- **They may also violate U.S. law having criminal sanctions**
  - **Anti-deficiency Act**
  - **Purpose Statute**

Types of SOFAs

- **NATO SOFA**
  - **Multilateral**
  - **Applies to NATO Members**
- **NON-NATO SOFA**
- **MINI-SOFA**
- **Administrative & Technical Agreement (A&T)**
- **As of Today - 108 SOFAs w/104 Countries**

Typical Fiscal Provisions

- Customs/import duties
  - Do U.S. Forces have to pay?
  - Must members of the force/civilian component pay?
- Taxes on purchase of goods on the local economy
  - Do U.S. Forces have to pay?
  - Must members of the force/civilian component pay?
- Banking & currency
  - Import of Currency? Banks on base?
- Use of U.S. and foreign medical facilities?
  - If so, who pays?

Fiscal Law Principles

- Authorization
- Appropriation
  - Purpose
  - Time
  - Amount

Authorization Act

- **Substantive legislation enacted by Congress that establishes or continues the legal operation of a Federal program or agency**
- **Provides no obligation authority**

Appropriations Act

A statute, under the jurisdiction of the House and Senate Appropriations Committees, that generally provides the authorization for Federal agencies to incur obligations and make payments out of the Treasury for specified purposes.

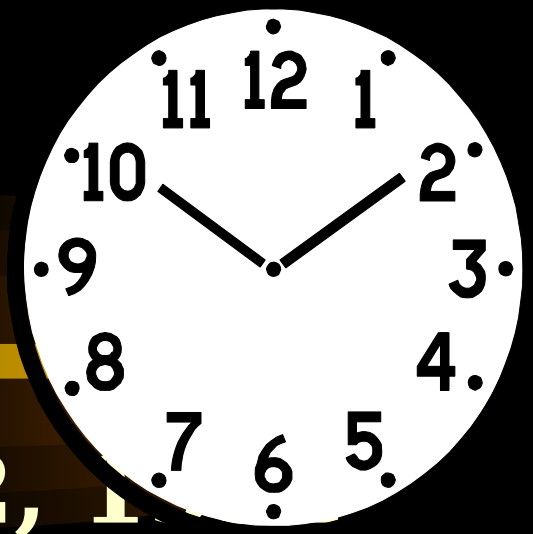
Purpose

- **31 U.S.C. § 1301(a)**
- **Cannot use funds appropriated for one purpose to augment another**

Purpose (continued)

- Look to the express language
- "Necessary Expense" rule:
  - Is there another appropriation?
  - Is the expense prohibited by law?
  - Is it reasonably necessary in carrying out an authorized function?

Time



- **31 U.S.C. § § 1502, [illegible]**
- **Appropriations have a life-span in which they can be obligated (“availability”)**
- **Annual, multi-year, no-year and special purpose appropriations**

Time (continued)

- The "bona fide needs" rule:
  - Funds may only be obligated for the bona fide needs of the agency during the period of availability
  - Limited exceptions: supplies, services & training

Amount

- **Title 31, U.S. Code**
- **Known collectively as the Antideficiency Act (ADA)**
  - **§ 1341 (in excess of or in advance of appropriation)**
  - **§ 1342 (voluntary services)**
  - **§ 1344 (government transportation)**
  - **§ 1517 (exceeding apportionment)**

Basic Concept

Distinguish between what State Department may sell, grant or loan to a foreign country (Security Assistance)

And those activities DoD conducts as part of a deployment in a foreign country, for which we receive the primary benefit and the host nation receives only a minor and incidental benefit!

✓ **Resist at all costs the deployed “all will be forgiven” syndrome**

In truth, nothing is forgiven…nor should it be

“I would have paid horse prices for sheep, if the sheep could have hauled artillery to the front! Oh, it’s all right to say we bought too much vinegar and too many cold chisels, but we saved the civilization of the world!”

Major General Charles G. Dawes

Purchasing Agent for the AEF,

Deployment - Related Activities

- **Exercise - Related Construction**
- **Training Activities**
- **Humanitarian & Civic Assistance (HCA)**

Operations & Maintenance (O&M) Appropriations

- **For day-to-day expenses of DoD in garrison and during exercises, deployments, and military operations**
- **Expenses all “necessary and incident” operations and maintenance unless statutorily limited**

Ahuas Tara Exercises

- **Series in Honduras in early 1980s**
- **Comp. Gen. Decision B-213137, 1984 and 1986**
- **Use of O&M funds for construction violated 10 U.S.C. § 2805(c)**
- **Training large numbers of Honduran troops violated Security Assistance laws**
- **DoD had no authority to use O&M funds for humanitarian and civic assistance**

When and Where do Questions Arise?

- **Combined (U.S. and foreign forces) exercises that are <u>also</u>**
- **Joint (more than one U.S. force involved) exercises and are <u>also</u>**
- **Outside the United States (although this is changing due to PfP exercises in U.S.)**

MEMORIZE THIS PHRASE!

“United States forces are the primary beneficiaries of this deployment-related activity. Foreign forces and nations receive only a minor and incidental benefit!”

Construction Activities

- Army Engineers & Seabees constructed 4 base camps - 3,000 U.S. troops
- Built number of roads, runways, & buildings - permanent structures
- Funded with O&M fund
- Violation of funding lim

Construction Basic Concep

- **All military construction projects must include all work necessary to produce a "complete and usable facility" or a "complete and usable improvement to an existing facility"**
  - **What is a "project" and what does it include?**
- **Does not include maintenance and repair**

Construction Funding Authorities

- **Exercise-Related Construction (ERC)**
  - **Specified Military Construction - > $1.5 m**
  - **Unspecified Minor Military Construction (UMMC)**
    - **MILCON - < $1.5 m**
    - **O&M - < $750,000 and not JCS-directed or JCS-coordinated project outside the United States**
- **Contingency Construction [NEW!!!]**
- **Emergency Construction Authorities**
- **Other Sources (e.g., CINC Initiative Funds)**

Types of Exercise-Related Construction (ERC)

- **Specified Military Construction - > $1.5 m**
- **Unspecified Minor Military Construction**
  - **MILCON - < $1.5 m**
  - **O&M - < $750,000 and not JCS-directed or coordinated exercise**
- **Emergency Construction Authority -**
  - **Declaration National Emergency**
  - **Contingency Construction**

Specified Military Construction

- **Specifically Appropriated in MILCON Appropriations**
- **Over $1.5 Million**

Unspecified Minor Military Construction I

- **<u>MILCON Funds</u> - each Service has annual "pot," but not more than $5 Mil. total per Service for overseas construction**
- **JCS directed/coordinated projects outside US**
- **Max $1,500,000 "approved cost" per project; $3 Mil. for life, safety, health threats**
- **Funded costs include….**
- **Must be enduring improvements and structures for future U.S. benefit**

Unspecified Minor Military Construction II

- **O&M Funds**
- **Non-JCS coordinated/directed project**
- **$750,000 per project; $1.5 Mil. in some cases**
- **Funded costs include….**
- **Construction - build & l**
- **Dollar exception if use f for “deployment and m**

Approval and Notification

Service Secretary has to approve any project exceeding $750,000 and notify Congress at least 21 days before beginning project

- **Whether use MILCON or O&M funds**
- **Whether use “deployment and mobility” funds**

Exercise O&M Funds for "Construction"

- **Recognized by GAO in Ahuas Tara II opinions**
- **"Minor Structures Clearly of a Temporary Nature"**
- **Congress has given specific limited examples:**
  - **Tent platforms**
  - **Field latrines**
  - **Range targets**
- **Must be removed at end of exer**
- **Can't abandon**
  - **DRMO**
  - **Foreign Assistance - State Dept**
  - ***Must coordinate in advance!***

Contingency Construction

- New authorized use of exercise O&M funds
- Effective 20 September 2002
- Chapter 7 [new], AFI 32-1032
- Only applies during contingency operations as defined in 10 U.S.C. § 101(a)(13)(A), occurring outside the United States
- In immediate and direct support of combat operations or force protection for those engaged in combat operations, particularly in countries where U.S. does not currently have significant permanent military presence

Contingency Construction

- Does not apply to any facility requirements costing less than $750,000- those will be provided under other authority such as 10 U.S.C. § 2805 and CINC Initiative Funds
- Only applies to operational requirement not expected to last more than 2 years
- Includes erection of facilities, acquisition of temporary interests in land, and design
- Use relocatable or semi-permanent construction to the maximum extent available
- Not for any facility supporting MWR activities

Contingency Construction

- Project approval authorities for projects that do not exceed $3,000,000 per project and will have a planned use of not more than 2 years include:
  - MAJCOM commanders with AOR responsibility (e.g., USAFE, PACAF)
  - Delegated to operational Air Force component commanders (COMAFFORs), at least in the grade of colonel, in the field
- SAF/IEI may approve projects over $3,000,000 or having a planned use of more than two years (requires compelling justification)
- If in a friendly foreign country, the host nation must approve construction and use of the site

Emergency Construction

- **Presidential declaration of war or national emergency**
  - **Use unobligated MILCON**
  - **Notify Congress, but no waiting**
- **Secretarial determination of an emergency**
  - **SECDEF or SECMILDEP**
  - **Vital to national security**
  - **Notice to Congress, 21 day waiting period**
  - **Use unobligated MILCON ($30m per FY limit)**
- **Contingency construction**
  - **SECDEF determination**
  - **Notice to Congress, 21 day waiting period**
  - **Only from funds previously appropriated**

Training Activities

- Army Medical Personnel
  - 3 - 5 Week Combat Medic Training
- Army Artillery Personnel
  - 3-4 Weeks of Artillery Training
- Army Special Ops
  - Basic & Advanced Classroom & Field Training
- Should have been done by Security Assistance!(?)

ning Activities

- **<u>Purpose</u>: TRAIN OUR FORCES**
- **Uses O & M Funds**
- **<u>Only</u> for familiarization, safety, and interoperability trainin**
- **Cannot rise to level normally provided by Security Assistance**
- **Primary purpose is to benefit our troops - minor benefit to host nation**

Joint Combined Exchange Training [JCET], 10 U.S.C. § 2011

- **Conducted by Special Operations Forces (SOF)**
  - **includes Civil Affairs and Psyops**
- **Authorizes "training, and training with, armed forces and other security forces of a friendly foreign country"**
- **Can pay "incremental expenses" of a <u>developing</u> country**
- **NO ADDITIONAL O&M FUNDS!!**
- **SecDef must approve all JCETs and report to Congress - explain the "unique" SOF benefit**

Training and Human Rights

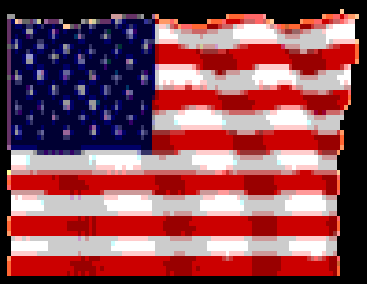
- § 8093 of FY2002 DoD Appropriations Act
- DoD cannot use funds for training purposes where credible information from DoS indicates that a member of the unit to be trained has committed “a gross violation of human rights, unless necessary corrective actions have been taken” - examples in Foreign Assistance Act
- Specific targeted programs
- Some programs excluded from scope
- We must vet everyone for each exercise

Contacts Programs, etc.

- **Different funding used for:**
  - **Mil-to-Mil Contacts**
  - **Latin American Forces**
  - **Developing Countries Attendar**
  - **Developing Countries Combine**
    Exercise Program (DCCEP)
  - **Expanded IMET**
  - **Reciprocal Exchanges with Friendlies/Int'l Orgns**
  - **Mil-to-Mil Contacts for Eastern Europe**
  - **Regional Cooperation Programs**

Humanitarian & Civic Assistance

- **DoD personnel treated:**
  - **46,000 Honduran medical pa**
  - **7,000 Honduran dental patie**
  - **200,000 immunizations**
  - **37,000 Honduran animals**
- **DoD transported medical supplies, clothes, etc. to locations**
- **Seabees built schoolhouses with local materials**
- **DoD had no statutory authority to do HCA!**



Humanitarian Assistance Programs (HAP)

- **Three general sources of funds for HAP**
  - **Primary Responsibility of DoS (USAID, etc.)**
  - **OHDACA Funds - for HAP**
  - **General O&M Fu**
    - **De Minimis**

Funded HCA

- **Funded as part of OHDACA**
- **In conjunction with authorized military operations overseas**
- **<u>Purposes</u>:**
  - **Promote national security interests**
  - **Improve US readiness skills (training)**
- **SECSTATE approves, SECDE reports**
- **Complement, not duplicate**
- **Need host nation approval**

Funded HCA (con't)

- **Meet basic economic and social needs of host country**
- **Only includes:**
  - **Medical, dental & vet care in rural or underserved areas**
  - **Rudimentary surface transportation systems**
  - **Well drilling and basic sanitation**
  - **Rudimentary construction and repair of public facilities**
  - **Landmine detection and clearing (*)**
- **Cannot be furnished to military or paramilitary groups or individuals**

De Minimis *HCA*

May Use O&M Funds for "Incidental Costs" Of Carrying Out Funded HCA

Reasonable Standard

Not type given by USAID

Minimal impact on mission,

De Minimis *HCA*

- **“Incidental Costs”**
  - **Unit doctor’s exam of local villagers for few hours and issuance of some medication - not dispatch of medical team for mass inoculations**
  - **Opening access road through trees and underbrush, not asphaltin**
- **BUT have to notify Cong**

  of each use of O&M fund

Overseas Humanitarian, Disaster and Civic Assistance (OHDACA)

- **One Central Funding Source:**
  - **HCA (prior section)**
  - **Transportation of Supplies**
  - **Foreign Disaster Assistance**
  - **Excess Nonlethal Supplies**
  - **Humanitarian Assistance Worldwi**

Transportation of Supplies (10 U.S.C. Sec. 402)

- **aka "The Denton Amendment"**
- **Without charge but on a space-available basis**
- **Furnished by an NGO for humanitarian assistance**
- **SECDEF has to determine certain conditions exist**
- **Can be distributed by lots of organizations but**
- **Not to military or paramilitary**

Foreign Disaster Assistance (10 U.S.C. § 404)

- **President may direct SECDEF to provide disaster relief**
  - **Transportation, supplies, services, and equipment**
- **Outside the United States for**
- **Manmade or natural disasters**
- **To prevent loss of life**
- **Notice to Congress w/in 48 hours**
- **Differs from Foreign Disaster Relief under 22 U.S.C. § 2292 (administered by USAID)**

Excess Nonlethal Supplies (10 U.S.C. § 2557)

- **“Nonlethal supplies” that are**
- **excess under DoD regulations**
- **are transferred to SECSTATE**
- **Different from drawdown of excess defense articles (EDA) under 22 U.S.C. § 2318**
- **Transport funded under 10 U.S.C. § 2551 (next slide)**

Humanitarian Assistance Worldwide

(10 U.S.C. Sec. 2551)

- **Authority to transport for humanitarian relief and other authorized purposes**
- **Under direction of SECSTATE**
- **Annual report to Congress**
  - **If transport excess nonlethal supplies, specific info in report**

Acquisition and Cross-Servicing

- **Acquisition and Cross-Servicing Agreements Statute**
- **SecDef may enter into agreements for:**
  - **Acquisition from foreign governments, UN, and international orgns of logistical support, supplies and services outside of U.S.**
  - **Cross-servicing with foreign governments, UN, and international orgns of logistical support, supplies and services anywhere in the world**
- **Currently ACSAs and IAs with 59 countries (8 pending)**
- **Has to be payment in some fashion**
- **Dollar limits apply (most are waived during contingency operations and various humanitarian, disaster, and peacekeeping operations)**

Combatant Commanders Initiative Funds – (O&M)

- General appropriation being used to supplement specific appropriations
- Congress annually gives $25 million to Chairman of Joint Chiefs of Staff
- Distributed among Combatant Commanders for use in AORs

Combatant Commanders Initiative Funds

- **Authorized uses include:**
  - **Force Training**
  - **Contingencies**
  - **Selected Operations**
  - **Humanitarian & Civic Assistance**
  - **Military Education & Training**
  - **Command & Control**
  - **Personnel Expenses for Bilateral or Regional Coop Programs**
  - **Force Protection**
  - **Joint Exercises**
- **No DoS approval/Congressional reporting requirements**
- **No requirement that US forces receive any benefit**
- **Can we provide benefits to military/paramilitary?**

Analysis

- **Determine CC's intent**
- **Define mission**
- **Break mission into specific & implied tasks**
- **Find legislative authority and appropriated funds**
- **Articulate rationale for expenditures**
- **Seek approval from higher headquarters, where necessary**

Preparing to Address Fiscal Law Questions

- **Army JAG School - Fiscal Law Course and Contract Attorneys Course**
- **Deployment Fiscal Law and/or Contingency Contracting**
  - **AF JAG School Deployment Fiscal Law and Contingency Contracting Course**

The Air Force JAG School

Enter Search Terms (Help):

Search Advanced

Deployed Fiscal Law and Contingency Contracting Course

13-15 November 2002, Major Juan-Carlos Guerrero, Course Director

- AFLMA Contingency Contracting Handbook (Quick View)
- An FM Perspective - 2000 (Quick View)
- Civilians During Military Operations Slides (Quick View)
- Civilians in Operations Outline (Quick View)
- Closing Remarks - 2001 (Quick View)
- Construction, Maintenance & Repair (Quick View)
- Contingency and Disaster Contracting and Fiscal Law Handbook (Quick View)
- Contingency Contracting Slides (Quick View)
- Course Schedule (Quick View)
- Fiscal Law (Quick View)
- Opening Remarks -2001 (Quick View)
- Overseas Humanitarian, Disaster and Civic Assistance Slides (Quick View)
- The Joint Ethics Regulation During Deployments (Quick View)
- Welcome Letter 2003 (Quick View)
- Aerospace Expeditionary Force Center Home Page
- Air Force Logistics Management Agency Home Page
- Air Force Materiel Command Contingency Contracting Home Page
- Course Director - Send Me a Message!
- Defense Acquisition Deskbook

http://afls14.jag.af.mil/dscgi/ds.py/View/Collection-235

Preparing to Address Fiscal Law Questions

- **Best References: Air Force Operations and the Law (2002); Army JAG School's Operational Law Handbook (annual); Contingency and Disaster Contracting and Fiscal Law Handbook (on DocuShare Page)**
- **Web Sites on DocuShare Page:**
  - **AFMC Contingency Contracting**
  - **AF Logistics Management Agency**
  - **AF Security Assistance Center**
  - **Defense Institute of Security Assistance Management**

Conclusions

- **Be sure to distinguish between what we can “give away” and what we have to sell or lease**
- **Make sure to brief survey team members as to the limits of their agreement authority**
- **Support the commanders, and keep them out of trouble**
- **Create a good audit trail**